

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-CV-12121-RGS

DIOMEDES ANZIANI

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION TO VACATE SENTENCE

July 5, 2007

STEARNS, D.J.

Diomedes Anziani, a federal inmate and citizen of the Dominican Republic, filed this *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Anziani was sentenced to a term of 121 months after he pled guilty to conspiring to distribute heroin. Anziani's motion to vacate rests on two grounds: (1) that his sentence was illegally enhanced because of the attribution by the court of a drug weight that was not specified in the indictment; and (2) that his counsel was ineffective at sentencing in failing to secure a "Fatico hearing" on the issue of drug quantity. In a "Traverse Response to the Government's Opposition," Anziani also claims that his counsel compromised his Sixth Amendment rights by failing to inform him of the protections of Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-101, T.I.A.S. No. 6820.¹

¹Article 36(1)(b) requires a signatory State, at the request of a foreign national taken into custody, to notify the nearest consular post of the national's home country. A State is also required by the same Article to "inform the person concerned without delay of his rights [under the Convention]."

BACKGROUND

On April 2, 2002, Anziani was arrested by agents of the Drug Enforcement Administration for trafficking in heroin. He was subsequently indicted for conspiring to possess and distribute heroin in violation of 21 U.S.C. § 846. At his arraignment, Anziani pled not guilty to the charge. On November 5, 2003, he changed his plea to guilty. At the hearing, Anziani reserved the right to contest the government's position that a 10-year mandatory minimum term of incarceration applied in his case.² Anziani's counsel assured the court that he had fully discussed the possible range of sentences with Anziani. In the ensuing colloquy, the court pursued the matter with Anziani, who, in response to the court's questions, indicated that he understood that the sentencing outcome depended in significant part on the court's determination of the weight of the drugs for which he would be held accountable. Anziani then agreed with the essentials of the government's proffer of facts, including his involvement in a heroin distribution network, his sales of heroin to a witness who was working in cooperation with law enforcement, and his participation in the sale of heroin to five other persons. The court made specific findings that Anziani had entered his plea of guilty with a full understanding of his rights, the consequences of waiving those rights, and with an acknowledgment that the government's evidence warranted a finding of guilt beyond a reasonable doubt.

At the sentencing hearing on July 19, 2005, Anziani (as anticipated) disputed the applicable drug weight, whether he had played a leadership role in the offense, and whether the court should increase the offense score by three levels because of an alleged

²There was no plea agreement with the government.

obstruction of justice. At the conclusion of the hearing, the court adopted the finding of the Presentence Report (PSR) that Anziani was responsible for the distribution of at least two kilograms of heroin. The court further found that Anziani had managed or supervised at least five of his coconspirators. See U.S.S.G. § 3B1.1(b). Anziani, however, was awarded an offsetting three-level reduction for acceptance of responsibility. See U.S.S.G. § 3E1.1.³ The adjusted total offense level of 32 counseled an advisory sentencing range of 121-151 months. In his allocution to the court, Anziani stated that his attorney had advised against seeking an evidentiary hearing on the issue of drug weight, and that he wanted to “show that I’m a man; that all those statements and all the things that she [the Assistant U.S. Attorney] has, all from other people, all those are lies, and they are more contradictory than anything else. But, if the Judge considers that he has enough proof to sentence me, then I leave that in his hands.” The court sentenced Anziani to 121 months of custody – the minimum sentence within the guideline range and one month above the statutory mandatory minimum.⁴ Anziani filed a timely appeal of the sentence, arguing that the court had insufficiently explained its reasons for imposing the 121-month sentence. The Court of Appeals summarily denied Anziani’s appeal on November 7, 2006.

DISCUSSION

Anziani’s first claim of constitutional error rests on the theory that the court’s sentence was based on a judicial finding of an attributable drug weight that was neither

³The court did not find sufficient evidence to support an enhancement for obstruction of justice.

⁴Anziani was also sentenced to four years of supervised release.

specified in the indictment nor determined at trial by a jury.⁵ The theory is flawed from the outset. A petit jury need find a sentencing factor only if the factor elevates the sentencing range above the otherwise applicable statutory maximum. See Apprendi v. New Jersey, 530 U.S. 466 (2000). “[T]he relevant ‘statutory maximum,’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” Blakely v. Washington, 542 U.S. 296, 303-304 (2004). “Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.” Harris v. United States, 536 U.S. 545, 565 (2002). Anziani’s custodial sentence was 121 months, the minimum prescribed by the advisory sentencing guideline range (121–151 months), and a sentence well within the 240-month maximum prescribed by statute for Anziani’s offense.

The jury’s role is to determine “that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy.” Derman v. United States, 298 F.3d 34, 43 (1st Cir. 2002). The trial judge then “lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury’s conspiracy-wide drug quantity determination”). Id. Here, of course, Anziani pled guilty to the conspiracy,

⁵Anziani maintains that the weight of the drugs should have been determined by a “federal grand jury.” It is reasonably certain that Anziani means to argue that the attributable drug weight should have been determined by a petit jury. That was the position taken in his Sentencing Memorandum.

thus obviating the need for a jury finding of liability. The crime to which Anziani pled carries a statutory maximum of twenty years. Anziani's sentence was roughly half that authorized by statute. The court's finding of drug weight and the related length of Anziani's sentence thus have no constitutional ramifications under the Apprendi line of Supreme Court cases.

Anziani's second ground of asserted error rests on the contention that his counsel was ineffective in failing to secure a Fatico hearing to challenge the drug weight findings contained in the PSR. "Fatico hearing" is a term derived from United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (Fatico I), which has become shorthand for evidentiary sentencing hearings in general. In Fatico I, defendants plead guilty to their involvement in a series of truck hijackings. At sentencing, the government proffered the testimony of an FBI agent that a reliable confidential informant had identified the defendants as members of the Carlo Gambino organized crime family. The government declined, however, to disclose the informant's identity. The sentencing court refused to consider the government's proffer on grounds that defendants' right of confrontation would be violated. On the government's appeal of what was in effect a suppression order, the Court of Appeals held that strict evidentiary rules do not apply at a sentencing hearing and that a court has broad discretion over the types of relevant evidence it wishes to hear in aid of sentencing. Id. at 713. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) (Fatico II) (affirming the broad discretion conferred on the trial court by Fatico I in deciding whether or not to hold an evidentiary hearing when facts relevant to sentencing are in dispute). See also United States v. Cheal, 389 F.3d 35, 45 (1st Cir. 2004).

At sentencing, Anziani indicated that after discussing the possibility of an evidentiary hearing with his attorney, they had agreed that a hearing was unnecessary. Anziani left the question of drug weight to the court with the statement that “if the Judge considers that he has enough proof to sentence me, then I leave that in his hands.” The court agreed that there was no need for an evidentiary hearing given its intensive familiarity with the 29-defendant case.⁶ As the government persuasively argues, “[h]aving himself raised the issue of an evidentiary hearing, and then deferr[ing] to the Court’s judgment on the matter, Anziani cannot now complain that his counsel’s failure to ask for an evidentiary hearing was constitutionally ineffective. . . . His counsel cannot be faulted for having failed to pursue a hearing for which Anziani himself disclaimed a need.” Government’s Memorandum, at 8.

In his response to the government’s opposition to his motion to vacate, Anziani for the first time raised the claim that his counsel’s failure to advise him of his rights under the Vienna Convention constituted ineffective assistance. The claim comes too late. See Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2682 (2006) (“The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review.”). However, even were the court to entertain Anziani’s claim, the outcome would be the same. Article 36(1)(b) of the Vienna Convention provides that

⁶Both Anziani and his counsel appeared to understand the risk that if an evidentiary hearing were held, the government might well have persuaded the court that the drug quantity attributable to Anziani in fact exceeded the amount specified in the PSR or that Anziani deserved the four-level upward adjustment for his role in the offense as advocated by the government and the Probation Office.

[i]f he [the defendant] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

Anziani does not allege that he was denied access to the Dominican Consulate, or that he ever sought consular assistance personally or through his attorney. Nor does Anziani suggest what the Dominican Consul-General could have accomplished on his behalf that his counsel was unable to achieve. In any event, in the view of most courts, the Vienna Convention confers no private right of enforcement on foreign nationals. See, e.g., Commonwealth v. Diemer, 57 Mass. App. Ct. 677, 684 (2003) (“Nothing in [the Vienna Convention’s] text explicitly provides for judicial enforcement of [its] consular access provisions at the behest of private litigants.”). See also United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000) (Selya and Boudin, concurring) (same). Cf. Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam) (doubtful that foreign nation may bring an action under the Convention to set aside the conviction of one of its nationals for a violation of the consular notification provisions).

ORDER

For the foregoing reasons, Anziani’s motion to vacate sentence is DENIED with prejudice. The case will be closed.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE